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Compiling an Administrative Record

MAJ Michele B. Shields

If an Army installation is involved in litigation that challenges an Army decision in the environmental arena, that installation will normally be required to compile an administrative record. An administrative record, i.e., "admin record" or "record", is the paper trail that documents the Army's decision-making process, the basis for the Army's decision, and the final decision. You, the environmental law specialist (ELS), will be called upon to assist and provide legal advice while the admin record is being compiled. Recently, the Department of Justice (DOJ) released a memorandum providing guidance to federal agencies on how to compile an administrative record of agency decisions.[1] This article will summarize the DOJ's guidance.

Generally, the Administrative Procedures Act (APA) governs judicial review of a challenged agency decision. A court will review the Army's action to determine if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under the APA. 5 U.S.C. 706(2)(A). The court will evaluate the Army's entire administrative record in making this determination. It is important to note that several other statutes and regulations may specify what documents and materials constitute the administrative record.[2] Therefore, before your installation begins compiling their admin record, you should determine whether the APA is the only statute and/or regulation that applies in your case.

One installation employee should be designated as the "certifying officer" in charge of compiling the administrative record. This individual should keep a record of where he searched for documents and materials and who was consulted in the process. He should be very meticulous when conducting the search and compiling the administrative record, otherwise, the court will be limited in their review of the Army's decision and the defense of that decision will be much more difficult. Ultimately, this individual may be required to prepare an affidavit certifying the contents of the administrative record to the court.

Before the certifying officer begins his search, you should discuss the following with him: what type of documents and materials should be included in the administrative record, where

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[1] Memorandum from Department of Justice to Federal Agencies, Guidance to Federal Agencies on Compiling the Administrative Record (January 1999) (unpublished memorandum, on file with author).

[2] See 42 U.S.C. 7607(d)(7)(A);42 U.S.C. 9613(j) and (k); 40 C.F.R. 300.800-300.825; 40 C.F.R. Part 24.

to look for those documents and materials, how to organize the administrative record, how to handle privileged documents and materials, and the importance of a complete administrative record.

First, the administrative record should consist of all documents and materials directly or indirectly considered by the Army in making the challenged decision. What does that mean? The administrative record should include all documents and materials that were: considered or relied upon by the Army; before or available to the Army at the time the decision was made; and before the Army at the time of the challenged decision, even if they were not specifically considered by the final decision-maker. If a document or material fits into one of the aforementioned categories but does not "support" the Army's final decision, it should still be included in the admin record. The bottom line is that all documents and materials that are ***relevant to the Army's decision-making process*** should be included in the administrative record.

The certifying officer may ask what "type" of documents and materials should be included in the administrative record. Documents and materials should not be limited to paper but should include other means of communication or ways of storing or presenting information such as e-mail, computer tapes and discs, microfilm and microfiche as well as data files, graphs, and charts. These documents and materials may include, but are not limited to, the following: policies, guidelines, directives, manuals, articles, books, technical information, sampling results, survey information, engineering reports, studies, decision documents, minutes of meetings, transcripts of meetings, notes, memorandums of telephone conversations and meetings.

The certifying officer may also ask what types of documents and materials should be excluded from the record. Clearly, documents that were not in existence at the time of the Army decision should not be included in the record. Additionally, as a general rule, the admin record should not include ***internal*** "working drafts" of documents. Draft documents, however, that were circulated outside the Army for comment and reflect significant changes in the Army decision-making process in their final version should be included in the admin record.

Second, the certifying officer should conduct a thorough search for the purpose of compiling the administrative record. The certifying officer should make a list of where files relating to the Army decision are located and conduct searches of those files. He should include public document rooms and archives on his list of places to look. Additionally, the officer should contact all Army personnel, including installation level and higher headquarters, involved in the decision and ask them to search their files for documents and materials related to the final decision. The certifying officer should also contact former employees involved in the decision and ask for guidance on where to search. If another agency was involved in the Army decision, the officer should contact the other agency and insure that any of their documents that were considered or relied upon by the Army in making the decision are included in the record.

Third, the certifying officer should organize the documents in a logical and accessible way, i.e., chronologically, topically, categorically, or otherwise. The certifying officer should also prepare an index of the administrative record that includes, at a minimum, the date, title, and brief description of the document. Once the certifying officer has completed the admin record, he should consult the installation ELS for review of privileged documents. When the record is finalized, the certifying officer may be required to prepare and sign an affidavit, which attests that he has personal knowledge of the assembly and authenticity of the record.

Fourth, once the certifying officer finishes compiling the record, he should turn it over to the ELS for review of privileged documents. The ELS should review the record and be sensitive to privileges and prohibitions against disclosure, including, but not limited to, attorney-client, attorney work product, Privacy Act, deliberative or mental processes, executive, and confidentiality. The ELS should consult with the assigned ELD and DOJ attorneys for guidance on how to annotate the privileged documents in the administrative

record index or a separate privilege log. The index or log should include, at a minimum, the date, title, and brief description of the document as well as the privilege asserted. The privileged documents themselves should be redacted or removed from the administrative record.

Finally, the ELS should stress the importance of a complete administrative record. By compiling a complete administrative record, the certifying officer will provide the court with evidence that supports the Army's decision and details the Army's compliance with the relevant statutory and regulatory requirements. If the administrative record fails to explain the Army's reasoning and final decision and frustrates judicial review, the court may remand the record to the Army. The court may allow the Army to supplement the record with affidavits or testimony. Once the Army supplements the record, however, the court may allow additional discovery if the opposing party proffers sufficient evidence to show: bad faith, improper influence on the decision-maker, or agency reliance on substantial materials not included in the record. An initially incomplete record raises questions as the completeness of the ultimately final record. An incomplete record also raises the possibility of additional unnecessary litigation. For these reasons, the ELS and certifying officer should do all they can to avoid an incomplete administrative record. (MAJ Shields/LIT)

Can States Squirm Out Of Liability? The 11th Amendment and CERCLA

LTC David B. Howlett

The Court of Appeals for the Second Circuit recently upheld the dismissal of a clean up suit against a state, saying that the action was barred by the Eleventh Amendment to the Constitution.

In Burnette v. Carothers,[3] homeowners (the Burnettes) claimed that a nearby Connecticut prison was contaminating their wells. They sued the state for environmental response costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[4] The District Court granted Connecticut's motion to dismiss for lack of subject matter jurisdiction, finding the suit was barred by the Eleventh Amendment to the Constitution.[5]

The Court of Appeals set out long-standing case law holding that a state is immune from suits brought in federal courts by its citizens. The Supreme Court has held that Congress may abrogate States' sovereign immunity if 1) Congress unequivocally expresses its intent to do so, and 2) Congress acts pursuant to a valid exercise of power.[6] Although Congress did intend unequivocally to abrogate States' immunity in CERCLA, it was acting pursuant to the Commerce Clause. According to the Supreme Court, only Congressional action taken under the authority of the Fourteenth Amendment would be sufficient to overcome States' Eleventh Amendment immunity.[7]

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[3] 49 ERC 1247 (2d Cir. 1999).

[4] 42 U.S.C. §9601, et seq. Plaintiffs also brought claims under the Clean Water Act and the Resource Conservation and Recovery Act, whose sovereign immunity provisions are substantially similar.

[5] The Eleventh Amendment provides that "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[6] Seminole Tribe v. Florida, 517 U.S. 44, 55 (1996).

[7] Id. at 59, 65-66.

The Court of Appeals rejected the idea that Congress, by creating a recovery claim, was establishing a property right pursuant to the Fourteenth Amendment. It also rejected the claim that Connecticut consented to federal jurisdiction by accepting federal funds to run its prison system

Plaintiffs next claimed that they were suing State officials rather than the State itself and that this did not violate the Eleventh Amendment according to Ex Parte Young, 209 U.S. 123 (1908). The Court of Appeals found that this claim had been waived by the plaintiffs in earlier proceedings. In any event, it is not clear that individual Connecticut officials would have been responsible parties under CERCLA §107.

In addition to maintaining the vitality of a two hundred-year-old Amendment, this case forces advocates in CERCLA litigation to consider whether State agencies can be properly joined as CERCLA responsible parties. This decision also adds new importance to the question of whether a State National Guard organization is a federal or State actor for purposes of its waste disposal actions. (LTC Howlett/LIT)